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Louisiana Law Review

Volume 35 | Number 3
Highlights of the 1974 Regular Session: Legislative Symposium
Spring 1975

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Repository Citation

Joseph Bradley Ortego, *The 1974 Juvenile Package*, 35 La. L. Rev. (1975)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol35/iss3/5

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THE 1974 JUVENILE PACKAGE

Right to Treatment

A juvenile proceeding has traditionally been considered a civil matter and not a criminal trial, with the state assuming the role of *parens patriae* rather than that of prosecuting attorney and judge.[1] Similarly, courts have considered the goals of the juvenile system to be rehabilitative, not penal.[2] Still, due process imposes fundamental fairness limitations upon the state in its treatment of juvenile offenders, although juvenile proceedings do not require all the safeguards of a criminal trial.[3]

Since the *parens patriae* rationale allows juveniles to be committed to institutions under conditions and procedures much less rigorous than those required by the criminal justice system, recent federal court decisions have recognized that due process requires the state to fulfill its parental obligations.[4] Because rehabilitation is the justification for confinement, the state must rehabilitate, not simply incarcerate, its children. In assuming the parental role, the state must tender what a good parent would provide—*individualized* care and treatment necessary for rehabilitation.[5] Much of the legislation enacted during the 1974 session as the Juvenile Package[6] was in response to such decisions enunciating the juvenile's constitutional "right to treatment."[7]

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1. Kent v. United States, 383 U.S. 541, 553 (1966).

2. Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972).

3. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Gault, 387 U.S. 1 (1967).

4. Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974); Morales v. Turman, 16 BNA CRIM. L. REP. 2050 (E.D. Tex. 1974) [hereinafter referred to as Morales II]; Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) [hereinafter referred to as Morales I]; Martarella v. Kelley, 349 F. Supp. 575, 600 (S.D.N.Y. 1972); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

5. *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974).

6. La. Acts 1974, Nos. 558 (R.S. 46:1901-26), 609 (R.S. 15:1081-83), 155 (R.S. 13:1580), 563 (R.S. 13:1580(5)), 424 (R.S. 13:1583), 559 (R.S. 13:1578.1), 560 (R.S. 13:1577(D,E)), 568 (R.S. 13:1571.1-.4), 561 (R.S. 13:1586.1 (E,F)), 564 (R.S. 15:1137), 567 (R.S. 15:1138), 562 (R.S. 13:1583.1).

Not discussed in the text, are La. Acts 1974, No. 257 (R.S. 15:840) which directs the Department of Corrections to establish and maintain a drug education and rehabilitation program at all juvenile correctional institutions under its jurisdiction, and No. 683 (R.S. 17:416(A)), adding drugs to the list of controlled dangerous substances the use of which in school buildings or on school grounds may lead to a student's suspension.

7. The rationale of the "right to treatment" is that "effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls." Martarella v. Kelley, 349 F. Supp. 575, 600 (S.D.N.Y. 1972).

Act 558 creates the Division of Youth Services as part of the Louisiana Health, and Social and Rehabilitation Services Administration to act as a vehicle for individualized and specialized treatment of juveniles. The purpose of the agency is to "improve, intensify, and coordinate" the state's efforts in preventing delinquency and in rehabilitating the state's delinquents. The functions of governmental bodies concerned with furnishing preventive and rehabilitative services to juveniles were centralized in the Division, which is authorized to establish programs for the study of delinquency and to train personnel who provide private or public services to juveniles.[8] The establishment of a system for training personnel in the juvenile field is important in light of the holding in *Morales v. Turman*[9] that a state's failure to employ qualified personnel to serve in its juvenile rehabilitive efforts is a denial of the juvenile's right to treatment.

The new agency is also empowered to develop or to assist in the development of a regional system of licensed community-based residential child-caring institutions.[10] The legislature's move to encourage the development of community centers may be required to fulfill the system's goal of rehabilitation, especially after the second *Morales* decision.[11] Finding two Texas rural juvenile institutions completely devoid of rehabilitative purposes, the federal district court in *Morales II* ordered the institutions closed and replaced with community-based alternatives. The court held that Texas could not simply institutionalize all its juvenile delinquents, because the juvenile's constitutional right to treatment requires that children be provided with the least restrictive mode of treatment, specifically community-based facilities and programs.[12] The same court had earlier held that the right to treatment requires the state to allow or to encourage the participation of family and interested friends in juve-

8. La. Acts 1974, No. 558, *adding* LA. R.S. 46:1905 (Supp. 1974).

9. Morales I, 364 F. Supp. 166, 175 (E.D. Tex. 1973): "Failure to employ an individual who is qualified by education, experience, and personal attributes to superintend the rehabilitation of juveniles who have engaged in seriously delinquent behavior constitutes a violation of those juveniles . . . right to treatment." *See also* Morales II, 16 BNA CRIM. L. REP. 2050, 2053 (E.D. Tex. 1974).

The appointment of the Division's director is to be made on the basis of his knowledge of and interest in the problems and programs of the Division and his ability to administer its programs. La. Acts 1974, No. 558, *adding* LA. R.S. 46:1904 (Supp. 1974).

10. La. Acts 1974, No. 558, *adding* LA. R.S. 46:1905 (Supp. 1974).

11. Morales II, 16 BNA CRIM. L. REP. 2050 (E.D. Tex. 1974). The Louisiana legislature's establishment of a system of community centers was not in response to this decision which was rendered in Sept., 1974, after passage of Act 558.

12. Morales II, 16 BNA CRIM. L. REP. 2050, 2051 (E.D. Tex. 1974).

nile rehabilitative programs.[13] Such participation is more readily available through a system of community centers.[14]

To insure that the court and the newly created Division of Youth Services is kept in touch with delinquents throughout the period of treatment, Act 609 requires that the Division be notified whenever a juvenile is assigned to, transferred from, or released from a non-state operated institution or child placing agency. In addition, non-state operated institutions and agencies are to furnish a quarterly evaluation of each child in their care to the court which committed the child and inform it of the child's progress.[15]

The effectiveness of treatment can be diminished if children who are more susceptible of rehabilitation are incarcerated with serious juvenile offenders. Acts 155 and 563, amending R.S. 15:1580, make important changes with respect to the orders juvenile courts may make regarding children brought before them. Act 155 declares that a child who has not been adjudicated delinquent[16] may not be committed to the Department of Corrections and that an adjudicated delinquent under the age of thirteen shall not be committed to the Department of Corrections unless he was adjudicated a delinquent for the commission of an act which would have been a felony if committed by an adult. The Division is empowered by Act 558 to oversee non-state institutions, a function formerly held by the Department of Corrections,[17] which now retains authority only over state institutions.[18] Since jurisdiction over any children who cannot be committed

13. Morales I, 364 F. Supp. 166, 175 (E.D. Tex. 1973).

14. Through Acts 564 and 567, the 1974 legislature further provided guidelines for the establishment of community-based institutions. La. Acts 1974, No. 564, *adding* LA. R.S. 15:1137 (Supp. 1974), authorizes the use of local court-approved private facilities for the rehabilitation of delinquents and specifies that such institutions are to be located where employment, education and training opportunities are readily available. La. Acts 1974, No. 567, *adding* LA. R.S. 15:1138 (Supp. 1974), provides for the reimbursement to communities of funds expended for the care and maintenance of delinquents committed to community-based institutions, provided such institutions are certified by the Division of Youth Services.

15. La. Acts 1974, No. 609, *amending* LA. R.S. 15:1081-82 (1950). The Division of Youth Services shall compensate such institutions and agencies, if the parents of such children are financially unable to do so. La. Acts 1974, No. 609, *amending* LA. R.S. 15:1083 (1950).

16. A child brought before a juvenile court can be adjudged a neglected child, a delinquent child, or a child in need of supervison. LA. R.S. 13:1580 (1950). LA. R.S. 13:1569 (1950) defines a delinquent act as "an act designated a crime under the statutes or ordinances of this state, or of another state if the act occurred in another state, or under federal law."

17. LA. R.S. 15:1081, 1082 (1950).

18. LA. R.S. 15:902 (1950).

to the Department of Corrections will fall to the Division of Youth Services, they will be committed to non-state institutions and thus are effectively separated from more serious juvenile offenders. Further, Act 563 authorizes the court to order a delinquent who is fourteen years of age or older to attend a state supported school or vocational-technical school if the school agrees to admit him.[19]

In shaping the right to treatment, the courts have emphasized the need for effective psychiatric services for committed juveniles.[20] Act 424 attempts to insure that juveniles who are committed to facilities for the mentally retarded are not simply detained, but are treated as well. The Act states that no court may commit a juvenile to a state-supported residential facility for the mentally retarded unless it has first been determined through a professional examination[21] that the child's needs can be met in an available facility possessing the physical space and staff necessary to implement "a program specific to the needs of the individual."[22]

Pre-Adjudicatory Detention

Detention of the juvenile during the pre-adjudicatory stage has been a matter of concern to some experts.[23] Generally, detention is

19. La. Acts 1974, No. 563, *adding* LA. R.S. 13:1580(5) (Supp. 1974). The Act further provides that the school shall not use the adjudication of delinquency as a factor in deciding whether to admit the child. *See also* Morales II, 16 BNA CRIM. L. REP. 2050, 2052 (E.D. Tex. 1974): "The right to treatment also includes the right to adequate counselling and training, including on-the-job training, and facilities and procedures for helping youths obtain work in the community." *Cf. Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1374 (D.R.I. 1972) where the court refused to decide whether petitioners had a claim to positive rehabilitative treatment in the form of vocational training, declaring that there was insufficient showing that vocational training is a necessary part of a rehabilitation plan.

20. *See* Morales I, 364 F. Supp. 166 (E.D. Tex. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972). *Cf.* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *noted in* 35 LA. L. REV. 563 (1975).

21. The examination is to be made by a diagnostic and evaluation team appointed by the Division of Mental Retardation. At least one member of the evaluation team must be a qualified mental retardation professional. La. Acts 1974, No. 424, *amending* LA. R.S. 13:1583(B) (1950).

To carry out the evaluations requested by the courts as authorized by Act 424, Act 562 directs the Louisiana Health, and Social and Rehabilitation Services Administration to establish a diagnostic center for delinquent children in New Orleans. La. Acts 1974, No. 562, *adding* LA. R.S. 13:1583.1 (Supp. 1974).

22. La. Acts 1974, No. 424 *amending* LA. R.S. 13:1583(B) (1950).

23. A survey of juvenile court judges has shown that they believe pre-adjudicatory detention is the most pressing problem facing the juvenile justice system. Smith, *A Profile of Juvenile Court Judges in the United States*, 25 JUV. JUSTICE, no. 2, at 34 (1974).

warranted only when necessary for the protection of the child or the public.[24] However, the lack of adequate legislative guidelines presents the possibility that pre-adjudicatory detention will be used as a means of punishment or treatment before hearing.[25]

Prior to the enactment of Acts 559 and 560, Louisiana law required that a juvenile apprehended by police be released to his parents or guardian upon a promise to produce the child in court unless it was impracticable or inadvisable or had otherwise been ordered by the court.[26] Act 559 establishes a more explicit standard for permissible detention, authorizing detention of a child alleged to have committed a delinquent act[27] only after demonstrable evidence is presented that he is likely to commit another delinquent act before returning to court or that a substantial probability exists that he will not appear in court.[28] Further, he may only be detained for as long as is essential to accomplish these purposes, and under Act 560 must be released after seventy-two hours if a petition alleging his delinquency has not been filed.[29] If the new guidelines are conscientiously applied, the possibility of undue hardship to the juvenile will be lessened.

Waiver Procedure

Waiver is the procedure by which a juvenile court abstains from exercising jurisdiction and the juvenile is instead tried in a criminal district court.[30] Characterizing the decision to try a juvenile in an

24. "To be consistent with the philosophy of juvenile court legislation, a child should not be incarcerated pending a hearing unless necessary to protect him or to protect society from him. It would be legitimately protecting a child to detain him when he is physically neglected by parents, when serious mental disorders seem present, or when he has no other place to go. It would be proper protection of society to detain when the crime a child is suspected of committing is a major felony, the presumption of guilt is great, and past behavior or present attitude indicate release may be followed by further misbehavior. In all other instances, a child should be released to his parents. Detention should never be a means of punishment or 'treatment' before hearing." Comment, 27 LA. L. REV. 606, 612 (1967).

25. *See generally* Sarri, *The Detention of Youth in Jails and Juvenile Detention Facilities*, 24 JUV. JUSTICE, no. 3, at 2 (1973).

26. LA. R.S. 13:1577 (1950), *as amended by* La. Acts 1972, No. 714 § 1; Comment, 27 LA. L. REV. 606, 614 (1967).

27. *See* note 16 *supra*.

28. La. Acts 1974, No. 559, *adding* LA. R.S. 13:1578.1 (Supp. 1974). In addition, the Act provides that if either or both of these two conditions exist, a child can be detained overnight "for another jurisdiction." *Id.* The apparent meaning of the phrase "for another jurisdiction" is "at the request of another jurisdiction."

29. La. Acts 1974, No. 560, *adding* LA. R.S. 13:1577(D) (Supp. 1974).

30. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 46 (1972).

adult court system as "critically important," the United States Supreme Court in *Kent v. United States*[31] held that the waiver procedure must meet certain standards to comply with due process: the juvenile is entitled to a hearing at which he is represented by counsel; all social records relied upon by the judge must be made available to the child's lawyer; the juvenile must be furnished a statement of the court's reasons for its decision to waive jurisdiction.[32]

Before adoption of Act 568, the concept of juvenile court waiver was unknown to Louisiana law.[33] In establishing the state's waiver procedure,[34] Act 568 conforms to the due process requirements enunciated in *Kent*, declaring that after a petition alleging delinquency is filed, the alleged offender *may* be transferred for prosecution in the district court only if all the following requirements are met: (1) The alleged offender has attained the age of fifteen;[35] (2) The juvenile has been granted a hearing at which he has been represented by counsel;[36] (3) Notice has been given the child and his parents at least ten days before the hearing; (4) There are reasonable grounds to believe that the child is not amenable to treatment or rehabilitation through the facilities available to the juvenile court; (5) The child has been previously adjudicated a delinquent by the commission of second degree murder, manslaughter, negligent homicide, simple rape, armed robbery, aggravated battery, aggravated burglary, aggravated arson or aggravated kidnapping. The Act also provides that a judge preside at the waiver hearing, that the proceeding be recorded, and that the general public be excluded.[37] The only admissible evidence is that

31. 383 U.S. 541 (1966).

32. *Id.* at 557.

33. Under the prior law, jurisdiction over the juvenile offender was exclusively vested in the juvenile court, with the exception of a child fifteen years of age or older charged with a capital crime or attempted aggravated rape. Since the juvenile court had no jurisdiction over the child at all, this instance would not be properly characterized as waiver. *See* LA. R.S. 13:1570 (1950).

34. *See* LA. CONST. art. V, § 19 which allows the legislature to establish a waiver procedure by a two-thirds vote of each house.

35. *Compare* CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH, EDUCATION, & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURT 34-35 (1966), which recommends that the child be at least sixteen years of age before jurisdiction is waived.

36. The Act also provides that if the child cannot afford to retain counsel, the court is authorized to appoint an attorney to represent him. La. Acts 1974, No. 568, *adding* LA. R.S. 13:1571.3 (Supp. 1974).

37. Neither the record of the hearing nor the reasons for the transfer shall be admissible in evidence in any subsequent criminal proceeding; however, such records are admissible for impeachment purposes. La. Acts 1974, No. 568, *adding* LA. R.S. 13:1571.2(C) (Supp. 1974). *See* Davis v. Alaska, 415 U.S. 308 (1974). *But see* State v. Williams, 309 So. 2d 303 (La. 1975). The child may be excluded from the hearing if

which pertains to the Act's transfer criteria and that needed to determine whether there is probable cause to believe that the juvenile committed the alleged delinquent act.[38] At the waiver hearing, the youth is granted the right to confront witnesses and the right against self-incrimination. Finally, either the child or the state may have the juvenile court's waiver decision summarily reviewed by the Louisiana supreme court.[39]

The provision that a child may not be transferred for trial in the district court unless he has been previously adjudicated delinquent by the commission of one of the listed offenses may create a serious problem. A major oversight in drafting is the omission of attempted aggravated rape and felonies punishable by death. Perhaps these offenses were omitted because the juvenile court has no jurisdiction to hear a case where a juvenile fifteen years or older is charged with attempted aggravated rape or a felony punishable by death.[40] However, the language of the new waiver provision means that waiver cannot be based upon a juvenile court's prior delinquency adjudication of a juvenile under fifteen for attempted aggravated rape or a felony punishable by death; nor can waiver be based upon a district court conviction of a fifteen year old for these offenses. Thus, if a child commits aggravated rape when he is fourteen and aggravated burglary when he is sixteen, the juvenile court may not transfer the case to the district court—a result hardly consonant with the policy of the waiver provision.

Louisiana's first waiver procedure, though a commendable effort to make transfer "discretion free," represents a marked departure from the previous insulation of the juvenile from the criminal courts and could be strengthened to provide more protection for the juvenile. For example, the statute should limit waiver to instances when

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his conduct is disruptive of orderly proceedings. La. Acts 1974, No. 568, *adding* LA. R.S. 13:1571.2(D) (Supp. 1974).

38. La. Acts 1974, No. 568, *adding* LA. R.S. 13:1571.4(A) (Supp. 1974). In allowing the introduction of evidence for a determination of probable cause, the Act implies that a finding of probable cause is necessary for a valid waiver; however, the affirmative consequences of a failure to find probable cause are not made clear by the statute.

39. La. Acts 1974, No. 568, *adding* LA. R.S. 13:1571.4(B) (Supp. 1974). This provision is preferable to the automatic dismissal in *Kent* which was based on the reasoning that if the juvenile court's waiver order was found invalid, the district court's judgment had to be vacated and the defendant freed because he was no longer subject to the juvenile court's jurisdiction.

40. *See* LA. CONST. art. V, § 19; La. Const. art. VII, § 52 (1921); LA. R.S. 13:1570 (1950); State *ex rel.* Moore v. Warden of Louisiana State Penitentiary, 308 So. 2d 749 (La. 1975).

the juvenile is accused of an offense which if committed by an adult would be a felony.[41]

Destruction of Juvenile Records

Act 561 alters the procedure for obtaining the destruction of juvenile records. Previously, the juvenile was afforded the right to the immediate destruction of records pertaining to matters which had been dismissed.[42] The new Act continues the prior law and provides that persons adjudged neglected or in need of supervision and juveniles adjudicated delinquent as a result of committing minor criminal acts[43] can obtain the destruction of their records at any time. Prior law also allowed *any* juvenile offender to obtain the destruction of his records after two years.[44] Under the new provision, a delinquent who is unable to obtain the immediate destruction of his records may do so five years after his final discharge, provided he was not adjudged delinquent on the basis of a violent crime against the person.[45]

Joseph Bradley Ortego

UNINSURED MOTORIST PROTECTION

Uninsured motorist (UM) insurance is designed to protect the insured from injury by an automobile not covered by liability insurance.[1] In effect, it insures against a tortfeasor's lack of insurance.[2] A

41. *See* CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 34-35 (1966), which recommends that the child be accused of a felony before jurisdiction is waived. *See also* MICH. STAT. ANN. § 27.3178 (598.4) (1944).

42. LA. R.S. 13:1586.1 (1950).

43. The Act includes the following within the non-exclusive enumeration of minor criminal acts: simple criminal damage to property, criminal mischief, criminal trespass, theft where the misappropriation or taking amounts to a value less than one hundred dollars, receiving stolen things when the value of the thing is less than one hundred dollars, unauthorized use of movables. La. Acts 1974, No. 561, *amending* LA. R.S. 13:1586.1(E) (Supp. 1972).

44. LA. R.S. 13:1586.1(F) (Supp. 1972). Prior to the change, Louisiana's two year period was one of the shortest in the country.

45. Violent crimes against the person include first degree murder, manslaughter, negligent homicide, aggravated battery, aggravated assault, aggravated rape, simple rape, aggravated kidnapping, armed robbery and extortion. La. Acts 1974, No. 561, *amending* LA. R.S. 13:1586.1(F) (Supp. 1972).

1. UM insurance is not to be confused with "no-fault" insurance in force in other states. Under UM insurance, the insured recovers from his own insurer, but fault is still an important issue. Thus, the insured must establish the legal liability of the uninsured motorist to recover under the UM provisions of his own policy.

2. I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 17.01 (1974).